

**A Datuk Seri Panglima Mohd Sari bin Datuk Hj Nuar v
 Vee Seng Development Sdn Bhd & Ors**

**B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-1151
 OF 2005
 HELILIAH, ABDUL MALIK ISHAK AND WAN ADNAN
 MUHAMAD JJCA
 10 MAY 2009**

**C *Evidence — Fresh or further evidence — Admission of fresh evidence on appeal
 — Principles to be applied — Whether evidence available at trial — Whether
 evidence had determining influence upon decision of High Court — Whether
 evidence satisfied principles in Ladd v Marshall***

**D The appellant/defendant sought to admit three affidavits filed in the Court of
 Appeal as fresh evidence for the purpose of the appeal (encl 31a). The fresh
 evidence sought to be adduced pertained to the defendant's notice of motion
 for stay which culminated in the exchange of affidavits between the parties.
 The plaintiffs' claim against the defendant was for a refund of RM7,350,000
 ('the moneys') collectively given to the defendant to facilitate the purchase of
 shares in six companies which were to be allocated certain lands. The
 defendant undertook to refund the moneys in the event the lands were not
 so allocated ('the first undertaking'). Upon the failure to get allocation of the
 land, the first and the third plaintiffs requested the defendant to continue
 with his endeavours to secure the said lands on their behalf. The defendant
 undertook to refund the moneys to the first respondent plaintiff upon formal
 notification by the first and the third plaintiffs ('the second undertaking').
 However, the second undertaking was subsequently superceded by an oral
 agreement between the defendant and the chairman of the first plaintiff ('the
 superceding agreement'). The defendant's stand was that the superceding
 agreement had extinguished the second agreement.**

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Held, allowing the application:

I (1) (per **Abdul Malik Ishak JCA) *Ladd v Marshall* [1954] 3 All ER 745
 laid down the principles for the reception of fresh evidence, inter alia,
 first, it must be shown that the evidence could not have been obtained
 with reasonable diligence for use at the trial; second, the evidence must
 be such that, if given, it would probably have an important influence on
 the result of the case, although it need not be decisive; and third, the**

- evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. The conditions laid were to be read cumulatively and not disjunctively. However, the discretion to admit fresh evidence is entirely on the court where the application is made (see paras 16 & 19). A
- (2) (per **Abdul Malik Ishak JCA**) On the facts, the first and third plaintiffs had deliberately misled and suppressed material evidence before the High Court and alleged that the defendant was liable for the payment of the shares, when in reality, from the fresh evidence it was clear that payment had been made by them from the very beginning. Consequently, the defendant's assertion that the first and the third plaintiffs had agreed to pay for the shares allocation themselves had been credible and consistent with the defendant's defence that was filed. In the circumstances, the defendant had rightly submitted that the fresh evidence could not have been obtained with reasonable diligence for use at the trial before the High Court (see paras 30–31). B
- (3) (per **Abdul Malik Ishak JCA**) The fresh evidence would show that the first and third plaintiffs had already paid for the shares allocated to the two companies themselves. Further, looking objectively at the material and the relevant facts that had been suppressed as well as the defendant's defence, it clearly showed that the first and the third plaintiffs had released the defendant from the second undertaking. Thus, it could be surmised that the fresh evidence would probably have an important influence on the outcome of the claim (see paras 32–34). C
- (4) (per **Abdul Malik Ishak JCA**) The documents sought to be admitted as fresh evidence had been filed in court and must be taken to be official court documents. Prima facie, the documents must be presumed to be believed and therefore they must be apparently credible although it need not be incontrovertible (see para 35). D
- (5) (per **Wan Adnan Muhamad JCA**) The facts of this case was different from the facts of the cases raised by the plaintiffs whereby in the cases the application to adduce fresh evidence in the appeal was on the evidence which does not exist in an appeal proceedings. Whereas, in the present application the fresh evidence was to adduce evidence in connection to the proceedings for stay (see para 60). E
- (6) (per **Wan Adnan Muhamad JCA**) The fresh evidence found at the very last minute could not possibly be made a statement in pleadings. However, the fresh evidence would assist the court in coming to a just decision. The admission of the fresh evidence would not prejudice the plaintiffs as the affidavits were inclusive of the plaintiffs' affidavits (see paras 62–63). F

A [Bahasa Malaysia summary]

- B** Perayu/defendan menuntut untuk penerimaan tiga afidavit yang difailkan di Mahkamah Rayuan sebagai keterangan baru bagi tujuan rayuan (lampiran 31a). Keterangan baru yang dituntut untuk dikemukakan berkenaan dengan
- C** notis usul defendan untuk penggantungan yang mana berakhir dengan pertukaran afidavit-afidavit di antara pihak-pihak. Tuntutan plaintif terhadap defendan ialah untuk bayaran balik RM7,350,000 ('wang') secara kolektif diberikan kepada defendan untuk memudahkan pembelian saham dalam enam syarikat yang mana akan diberikan tanah. Defendan-defendan
- D** mengakujani untuk membayar balik wang tersebut sekiranya tanah tersebut tidak diagihkan ('akujani pertama'). Apabila gagal untuk mendapatkan pengagihan tanah, plaintif pertama dan ketiga meminta defendan untuk menyambung ikhtiarnya untuk mendapatkan tanah tersebut bagi pihak mereka. Defendan membayar balik wang kepada responden pertama melalui pemberitahuan formal oleh plaintif pertama dan ketiga ('akujani kedua'). Walau bagaimanapun, akujani kedua kemudiannya digantikan dengan perjanjian lisan di antara defendan dan pengerusi plaintif pertama ('perjanjian penggantian'). Pendirian defendan ialah penjanjian penggantian telah membatalkan perjanjian kedua.
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Diputuskan, membenarkan permohonan:

- F** (1) (oleh **Abdul Malik Ishak HMR**) *Ladd v Marshall* [1954] 3 All ER 745 menyatakan prinsip-prinsip untuk penerimaan keterangan baru, iaitu, pertama, ia mesti menunjukkan bahawa keterangan tidak boleh didapati dengan usaha yang munasabah untuk digunakan pada perbicaraan; kedua, keterangan mestilah, sekiranya diberikan,
- G** mempunyai pengaruh penting kepada keputusan kes, walaupun ia bukanlah muktamad; dan ketiga, keterangan tersebut mestilah berkemungkinan boleh dipercayai, atau dalam perkataan lainnya, ia mestilah kredibel, walaupun tidak semestinya ia tidak boleh dipertikaikan. Syarat yang dinyatakan perlu dibaca secara bersama dan bukannya berasingan. Walau bagaimanapun, budi bicara untuk menerima keterangan baru sepenuhnya terletak pada pihak mahkamah di mana permohonan itu dibuat (lihat perenggan 16 & 19).
- H**
- I** (2) (oleh **Abdul Malik Ishak HMR**) Berdasarkan fakta, plaintif pertama dan ketiga telah memperdayakan dan menyekat keterangan material di Mahkamah Tinggi dan menghujah bahawa defendan bertanggungjawab untuk bayaran saham-saham, sedangkan realitinya, daripada keterangan baru adalah jelas bahawa bayaran sudahpun dibuat oleh mereka dari permulaan. Oleh itu, hujahan defendan bahawa plaintif pertama dan ketiga telah bersetuju membayar untuk saham yang diperuntukkan

- kepada mereka boleh dipercayai dan konsisten dengan pembelaan defendan yang difailkan. Dalam keadaan ini, defendan dengan betul menghujah bahawa keterangan baru tidak boleh didapati dengan usaha munasabah untuk digunakan pada perbicaraan Mahkamah Tinggi (lihat perenggan 30–31). A
- (3) (oleh **Abdul Malik Ishak HMR**) Keterangan baru akan menunjukkan bahawa plaintif pertama dan ketiga telahpun membayar bagi saham yang diperuntukkan kepada dua syarikat tersebut. Selanjutnya, dengan melihat secara objektif pada material dan fakta-fakta relevan yang telah disekat begitu juga dengan pembelaan defendan, jelas menunjukkan bahawa plaintif pertama dan ketiga telah membebaskan defendan daripada akujanji kedua. Oleh itu, keterangan baru diandaikan mempunyai pengaruh penting kepada keputusan tuntutan tersebut (lihat perenggan 32–34). B C
- (4) (oleh **Abdul Malik Ishak HMR**) Dokumen-dokumen yang dituntut untuk diterima sebagai keterangan baru telah difailkan di mahkamah dan dianggap sebagai dokumen-dokumen rasmi mahkamah. Prima facie, dokumen-dokumen tersebut mestilah boleh dipercayai dan kredibel walaupun tidak semestinya tidak boleh dipertikaikan (lihat perenggan 35). D E
- (5) (oleh **Wan Adnan Muhamad HMR**) Fakta kes ini adalah berbeza dengan fakta kes-kes yang dibangkitkan oleh plaintif-plaintif di mana dalam kes-kes tersebut permohonan untuk mengemukakan keterangan baru dalam rayuan ialah mengenai keterangan yang tidak wujud dalam prosiding rayuan. Manakala dalam permohonan ini keterangan baru adalah untuk mengemukakan affidavit-afidavit bersabit dengan prosiding penggantungan (lihat perenggan 60). F
- (6) (oleh **Wan Adnan Muhamad HMR**) Keterangan baru yang ditemui pada saat-saat akhir tidak mungkin dapat dijadikan kenyataan dalam pliding. Walau bagaimanapun, keterangan baru tersebut akan dapat membantu mahkamah mencapai keputusan yang saksama. Penerimaan keterangan baru tidak akan memprejudiskan plaintif-plaintif kerana affidavit-afidavit tersebut juga termasuk affidavit pihak plaintif-plaintif (lihat perenggan 62–63).] G H

Notes

For a case on admission of fresh evidence on appeal, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1534. I

Cases referred to

Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy [1995] 3 MLJ 445; [1996] 1 CLJ 725, CA (refd)

- A *Ing Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong* [2001] 4 MLJ 461, CA (refd)
Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors [1996] 2 MLJ 666, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (folld)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)
- B *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282, CA (refd)
Maxisegar Sdn Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 1, CA (distd)
Sinanide v La Maison Cosmeo (1927–1928) 44 TLR 574 (refd)
Teoh Kien Peng & Anor v Thannimalai all Subramaniam [2008] MLJU 403, CA (refd)

Legislation referred to

- Courts of Judicature Act 1964 s 69
Rules of the Court of Appeal 1994 r 7, 7(3), (3A)
- D Rules of the High Court 1980 O 55 r 5A

Appeal from: Civil Suit No D3–22–2037 of 1999 (High Court, Kuala Lumpur)

- E *Mohd Shafee Abdullah (Shafee & Co) for the appellant.*
Saranjit Singh (Mohd Zain & Co) for the respondents.

Abdul Malik Ishak JCA:

- F [1] I find myself in complete agreement with the judgment of my learned brother Wan Adnan Muhamad JCA and I concur that the reception of fresh evidence advanced by the appellant defendant in encl 31a be allowed. However, I wish to express my views about the reception of fresh evidence in
- G the context of encl 31a.

- [2] The appellant defendant sought to admit three affidavits filed in this court as fresh evidence for the purpose of using these three affidavits in the appeal before this court. The brief background that prompted the appellant
- H defendant to adduce the fresh evidence may be stated as follows.

- [3] The trial proper was concluded on 26 July 2005 and judgment was entered on 19 September 2005. The fresh evidence sought to be adduced pertained to the appellant defendant's notice of motion for stay which culminated in the exchange of affidavits between the parties. The affidavit in
- I reply of the respondents plaintiffs affirmed by Lim Chin Khuan on 28 December 2005 enclosed documents which were suppressed during the trial of this action in the High Court and were in direct contradiction to exhibit marked as 'DSSN-3'.

[4] The first respondent plaintiff by the name of Vee Seng Development Sdn Bhd was wholly owned by the third respondent plaintiff by the name of Veetar Plantations Sdn Bhd. While the second respondent plaintiff was an independent company. The respondents plaintiffs' claim against the appellant defendant was for a refund of RM7,350,000 ('the moneys') collectively given to the appellant defendant to facilitate the purchase of shares in six companies which were to be allocated certain lands. The appellant defendant undertook to refund the moneys in the event these lands were not so allocated ('the first undertaking').

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[5] It turned out that the said lands cannot be allocated. An arrangement was then made between the parties. The first and the third respondents plaintiffs who were still interested in these lands had to re-pay the second respondent plaintiff of its portion of money and they requested the appellant defendant to continue with his endeavours to secure the said lands on their behalf. The appellant defendant undertook to refund the moneys to the first respondent plaintiff upon formal notification by the first and the third respondents plaintiffs ('the second undertaking').

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[6] Interestingly, the second undertaking was superceded by an oral agreement between the appellant defendant and the chairman of the first respondent plaintiff by the name of Lim Kim Yeow ('the superceding agreement').

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[7] The superceding agreement brought into the picture the following state of affairs:

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- (a) that the first respondent plaintiff would provide a loan of RM20m to a company known as Win Luck Sdn Bhd ('the loan sum');
- (b) that the first and third respondents plaintiffs' claim of the moneys would be released to Win Luck Sdn Bhd as being part of the loan sum; and
- (c) that by way of a circular resolution dated 22 December 1999, it was agreed that Win Luck Sdn Bhd would pledge 35,714 ordinary shares in Borneo Utama Sdn Bhd as collateral and/or security for the loan sum.

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[8] By virtue of the superceding agreement, the stand of the appellant defendant was made clearer. It was this. That the second undertaking had been extinguished.

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[9] At the trial, evidence was led and it was not denied that the appellant defendant succeeded in procuring for the first and the third respondents plaintiffs an interest in shares that was equivalent to the moneys in two

- A companies, namely, Anika Desiran Sdn Bhd and Corak Nakhoda Sdn Bhd ('the two companies'). And by virtue of the superceding agreement, the first and the third respondents plaintiffs were then obliged to make payment for the shares allocated.
- B [10] The respondents plaintiffs disagreed and they maintained that the appellant defendant was obliged to cause the shares to be allocated to them by way of the two companies and, at the same time, to make payment for the same in lieu of the second undertaking.
- C [11] On 19 September 2005, the High Court after a trial entered judgment in favour of the respondents plaintiffs.
- D [12] On 9 December 2005, the appellant defendant applied for a stay before this court and one of the grounds relied upon by the appellant defendant was that the first and the third respondents plaintiffs having been allocated shares in the two companies would not suffer a detriment should the stay be granted.
- E [13] The appellant defendant said that the first and the third respondents plaintiffs have received the full benefit and value of the moneys through the allocation of the shares.
- F [14] The affidavit in reply of Lim Chin Khuan on 28 December 2005 for the respondents plaintiffs attempted to adduce evidence that the first and the third respondents plaintiffs have already made payment to the two companies for the shares allocated and, consequently, they would suffer a detriment should a stay of execution be granted. This was the fresh evidence that the appellant defendant wanted to adduce.
- G [15] Bluntly put, the affidavit in reply of Lim Chin Khuan on 28 December 2005 contradicted the exhibit marked as 'DSSN-3'. The fresh evidence showed that the first and the third respondents plaintiffs had made direct payment of the shares allocated to them to the two companies on the same day when the demand was made to the appellant defendant for payment of the shares.
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- I [16] The jurisdiction to admit fresh evidence begins with the case of *Ladd v Marshall* [1954] 3 All ER 745, a decision of the English Court of Appeal with a coram of Denning, Hodson and Parker LJJ. All the three Lord Justices wrote separate judgments. Of importance would be the judgment of Denning LJ. There Denning LJ laid down the principles for the reception of fresh evidence at p 748 in this way:

In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

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[17] And according to three Malaysian Court of Appeal cases, the conditions stipulated in *Ladd v Marshall* are to be read cumulatively and not disjunctively. See *Ing Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong* [2001] 4 MLJ 461 (CA); *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282 (CA); *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1 (CA).

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[18] And if the appellant defendant fails to satisfy one condition, he fails altogether.

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[19] It must be emphasised that the discretion to admit fresh evidence is entirely that of the court to whom the application is made (*Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666 (CA)).

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[20] Statute wise, there are three statutes to refer to. Firstly, it is O 55 r 5A of the Rules of the High Court 1980 ('RHC') which states as follows:

5A Restriction on fresh evidence (O 55 r 5A)

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At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that —

- (a) at the hearing before the subordinate court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
- (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court.

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[21] Secondly, it is s 69 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972) which enacts that:

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69 Hearing of appeals

- (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court,

- A** together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
- B** (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
- (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
- C** (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
- D** (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.
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[22] Thirdly, it is r 7 of the Rules of the Court of Appeal 1994 which states as follows:

- F** 7 Power of Court to amend, admit further evidence, or draw inference of fact
- (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.
- G** (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
- H** (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent aforesaid, shall be admitted on special grounds only, and not without leave of the Court.
- I** (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —
- (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party

seeking to use it, or that reasonable diligence would not have made it so available; and

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- (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

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- (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

- (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appeal from or complained of the decision.

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[23] In an unreported dissenting judgment in the Court of Appeal, *Teoh Kien Peng & Anor v Thannimalai all Subramaniam* [2008] MLJU 403, I had occasion to consider the phrase 'special grounds' employed in r 7(3) of the Rules of the Court of Appeal 1994 and this was what I said at pp 27 to 28:

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- [49] The phrase '*special grounds*' appears in r 7(3) of the Rules of the Court of Appeal 1994. The old English RSC O 59 r 10(2), also makes reference to the phrase '*special grounds*' and the relevant part provides as follows: '*no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds*'. Hale LJ writing for the English Court of Appeal in *Hertfordshire Investments Ltd v Bubb & Anor* [2000] 1 WLR 2318 had this to say at p 2324 in regard to the phrase 'special grounds'. This was what His Lordship Hale LJ said:

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Special grounds, as we all know, meant that the fresh evidence satisfied the principles in *Ladd v Marshall* [1954] 1 WLR 1489: that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible; although there are exceptional cases in which those principles do not apply, for example those involving the welfare of children.

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There are, of course, strong reasons for this approach, which has a long pedigree. It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.

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- A [24] Be that as it may, the three conditions in *Ladd v Marshall* have been referred to from time to time in varying fact situations. But, judges must not let *Ladd v Marshall* and the subsequent authorities to go astray from the fact that the question whether fresh evidence should be received is a matter purely for the discretion to be exercised judicially by the judges themselves. It must
- B be remembered that it is not in the interest of justice to re-open a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result of the appeal (this is the second condition stated in *Ladd v Marshall*).
- C [25] Perhaps the time has come for the court to admit fresh evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so (*Sinanide v La Maison Cosmeo* (1927–1928) 44 TLR 574).
- D [26] I will now consider the three conditions set out in *Ladd v Marshall* to the facts of the present case in the context of encl 31a.
- E THE FIRST CONDITION (THAT THE EVIDENCE COULD NOT HAVE BEEN OBTAINED WITH REASONABLE DILIGENCE FOR USE AT THE TRIAL)
- F [27] The documents exhibited in the affidavit in reply of Lim Chin Khuan which was affirmed on 28 December 2005 which constituted the fresh evidence was suppressed during the trial before the High Court and it was in direct contradiction with ‘DSSN-3’. The fresh evidence showed that the first and the third respondents plaintiffs had made direct payment of the shares allocated to them, to the two companies, on the same day the demand was made to the appellant defendant for payment of the shares allocated in lieu of the second undertaking.
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- H [28] It was the appellant defendant’s defence that the second undertaking was extinguished by the superceding agreement and that the first and the third respondents plaintiffs were liable to pay for the shares allocated in the two companies.
- I [29] It must be recalled that both the first and the third respondents plaintiffs relied on the fresh evidence in order to oppose the appellant defendant’s stay application.
- [30] It cannot be doubted that the first and the third respondents plaintiffs had deliberately misled and suppressed material evidence before the High Court and alleged that the appellant defendant was liable for the payment of the shares, when in reality, from the fresh evidence it was clear that payment

had been made by them from the very beginning. Consequently, the appellant defendant's assertion that the first and the third respondents plaintiffs had agreed to pay for the shares allocation themselves had been credible and consistent with the appellant defendant's defence that was filed.

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[31] The appellant defendant rightly submitted that the fresh evidence could not have been obtained with reasonable diligence for use at the trial before the High Court. It was apparent from exh 'DSSN-3', that the appellant defendant, at all material times, believed that the first and the third respondents plaintiffs had not paid for the shares and had brought this suit to recover the moneys with the view of paying for the same.

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THE SECOND CONDITION (THAT THE EVIDENCE MUST BE SUCH THAT, IF GIVEN, IT WOULD PROBABLY HAVE AN IMPORTANT INFLUENCE ON THE RESULT OF THE CASE, ALTHOUGH IT NEED NOT BE DECISIVE)

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[32] The fresh evidence would show that the first and the third respondents plaintiffs had already paid for the shares allocated to the two companies themselves. Had the learned judge of the High Court been advised that the first and the third respondents plaintiffs had made the payment for the shares allocated to the two companies on the very same day when the demand was made to the appellant defendant to make payment for the same, the learned judge of the High Court may come to an entirely different conclusion.

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[33] Looking objectively at the material and the relevant facts that had been suppressed as well as the appellant defendant's defence, it clearly showed that the first and the third respondents plaintiffs had released the appellant defendant from the second undertaking.

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[34] For these reasons, it can be surmised that the fresh evidence would probably have an important influence on the outcome of the claim.

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THE THIRD CONDITION (THAT THE EVIDENCE MUST BE SUCH AS IS PRESUMABLY TO BELIEVED, OR IN OTHER WORDS, IT MUST BE APPARENTLY CREDIBLE, ALTHOUGH IT NEED NOT BE INCONTROVERTIBLE)

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[35] Enclosure 31a sought to admit as fresh evidence the notice of motion for stay dated 9 December 2005 together with the three affidavits. All these documents have been filed in court and must be taken to be official court

A documents. Prima facie, these documents must be presumed to be believed and hence they must be apparently credible although it need not be incontrovertible.

B [36] All the three conditions in *Ladd v Marshall* have been satisfied. I would accordingly, without hesitation, allow encl 31a.

C [37] Once again, permit me to refer to my unreported dissenting judgment in the Court of Appeal, *Teoh Kien Peng & Anor v Thannimalai all Subramaniam*. There at pp 30–32, this was what I said:

D [52] *Ladd v Marshall* was decided in 1954. On 2 March 1970, the then Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 applied *Ladd v Marshall*. In 1970, the Court of Appeal has not been set up. It was only in 1994 that the Court of Appeal was constituted. So, when the then Federal Court in *Lau Foo Sun v Government of Malaysia* decided the issue of adducing further evidence, r 7(3A) of the Rules of the Court of Appeal 1994 cannot be invoked for the simple reason that the Rules only came into force on 24 June 1994. We now have r 7(3A) of the Rules of the Court of Appeal 1994 and we should vigorously apply it to the present appeal at hand instead of resorting wholesale to *Ladd v Marshall*. A classic example would be the case of *Lombard Natwest Factors Ltd v Sebastian Justin Arbis* [2000] BPIR 79 (Ch D) where the brief facts may be stated as follows. Natwest sought to re-open a bankruptcy hearing because new evidence had come to light. The question was whether the provisions of r 59.10 in Schedule 1 to the Civil Procedure Rules 1998 ('CPR') should be interpreted in the light of the overriding objective in r 1.2 of the CPR or in the light of the Court of Appeal decision of *Ladd v Marshall*. The form of wording in r 59.10 in Schedule 1 to the CPR is exactly the same as that adjudicated upon in *Ladd v Marshall*. Hart J, held that even though the two provisions were worded identically, it did not mean that the old interpretation had to apply. According to His Lordship, r 59.10 in Schedule 1 to the CPR had to be interpreted in the light of the overriding objective.

H [53] It is now opportune to narrate the facts in *Ladd v Marshall*. It is as follows. Ladd claimed repayment of a sum of £1,000 from Marshall. The latter denied receiving the money. At the trial, Ladd called Marshall's wife. In her evidence, she professed to know nothing of the transaction. The trial judge found that Ladd had not proved his case and gave judgment for Marshall. Some months after judgment had been entered, Marshall's wife obtained a divorce from her husband and thereupon she told Ladd's solicitors that she had given false evidence at the trial. Her excuse was that at the time of the trial she

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was living in Marshall's house and was afraid of telling the truth. Ladd appealed to the Court of Appeal, applying for a new trial, and moved for leave to adduce further evidence. Ladd's counsel argued that the relevant rule of court (then it was the RSC O 58 r 4) was in wide terms, that there was a complete discretion in the court which ought not to be fettered to receive further evidence 'if the justice of the case requires it'. Unfortunately, the appeal failed. Denning LJ said that it was very rare that an application was made to the court for a new trial on the ground that a witness had told a lie. His Lordship added that the principles to be applied are the same as those always applied when fresh evidence was sought to be introduced. His Lordship then set out the three conditions as reproduced in the early part of this judgment.

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[54] Of course, you cannot allow *Ladd v Marshall* to stand in the way of doing justice in an individual case. I have said this earlier. When you see this happening, you will notice that the decided cases have been distinguished by the judges and when this happens you will see that the law has become more elaborate. This causes no difficulty because it illustrates the exercise of discretion by the judges to the particular facts of the case.

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[38] Now, even if I were to apply the provisions of r 7(3A) of the Rules of the Court of Appeal 1994, I would still allow encl 31a in favour of the appellant defendant. And additionally, it is also just to do so.

Wan Adnan Muhamad JCA:

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[39] Ini adalah keputusan mahkamah. Panel ini sebulat suara telah membenarkan permohonan rayu melalui lampiran 31a iaitu suatu notis usul yang dibuat di bawah peruntukan s 69 Akta Mahkamah Kehakiman 1964 ('Akta') berserta dengan peruntukan k 7 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Lampiran 31a tersebut ialah untuk suatu perintah seperti berikut:

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- (a) Dokumen-dokumen yang berikut, yang kesemuanya difailkan di Mahkamah Rayuan Malaysia iaitu Rayuan Sivil No W-02-1151 Tahun 2005 diterima dan dibaca sebagai keterangan pada pendengaran rayuan rayu di mahkamah yang mulia ini:
- (i) Notis usul bertarikh 9 Disember 2005;
 - (ii) Afidavit sokongan No 1 yang diikrarkan oleh Datuk Seri Panglima Mohd Sari bin Datuk Nuar pada 7 Disember 2005;
 - (iii) Afidavit jawapan responden-responen yang diikrarkan oleh En Lim Chin Khuan pada 28 Disember 2005; dan

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- A** (iv) Afidavit jawapan No 2 yang diikrarkan oleh Datuk Seri Panglima Mohd Sari bin Datuk Nuar pada 9 Januari 2006.
- (b) Kos permohonan ini dijadikan kos dalam kausa di Mahkamah Rayuan Malaysia, Rayuan Sivil No W-02-1151 Tahun 2005; dan
- B** (c) Mana-mana perintah dan/atau arahan lain yang dianggap patut dan sah oleh mahkamah mulia ini.
- C** [40] Terlebih dahulu kami akan paparkan secara ringkas kronologi fakta kes untuk mendapat gambaran yang jelas bagi menghayati keputusan yang kami telah capai.
- D** [41] Perayu pemohon ialah defendan dalam prosiding di Mahkamah Tinggi Kuala Lumpur. Manakala responden-responden ialah plaintif dalam prosiding berkenaan. Untuk mengelak kekeliruan, selepas ini saya bahasakan pemohon sebagai perayu dan responden-responden sebagai responden.
- E** [42] Responden telah berjaya mendapat suatu penghakiman terhadap perayu selepas perbicaraan penuh di Mahkamah Tinggi. Tindakan responden ialah untuk mendapat balik sejumlah wang iaitu RM7,350,000 yang telah diberi kepada perayu berikutan suatu cadangan pembelian saham syarikat Pandai Kaya Sdn Bhd dan saham enam syarikat lain seperti dipersetujui oleh perayu dan responden.
- F** [43] Perayu memperakui peranannya sebagai pemegang amanah (stake holder) wang berkenaan kepada responden pertama dan responden ketiga yang merupakan ejen kepada responden kedua. Jika responden menarik balik rancangan pembelian saham syarikat-syarikat tersebut, perayu akan memulangkan balik wang RM7.350 juta tersebut seperti surat akujanji perayu bertarikh 10 November 1997 (eksh DSSN-2).
- G**
- H** [44] Responden telah menarik balik cadangan untuk membeli saham-saham berkenaan melalui surat mereka bertarikh 11 November 1997. Responden melalui surat peguam mereka bertarikh 5 Disember 1997 membuat tuntutan untuk mendapat balik wang RM7.350 juta tetapi perayu gagal berbuat demikian.
- I** [45] Pembelaan perayu ialah akujanji tersebut (DSSN-2) untuk bayar balik wang berkenaan telah diambil alih oleh perjanjian berbentuk sebahagian lisan dan sebahagian bertulis (superceding agreement) di antara perayu dengan seorang bernama Lim Kim Yeo iaitu pengerusi R1 yang berbentuk seperti berikut:
- (a) Responden pertama akan biayai pinjaman kepada Syarikat Win Luck Sdn Bhd (Win Luck) sebanyak RM20 juta.

- (b) Wang sebanyak RM7.350 juta akan dibayar kepada Win Luck sebagai sebahagian pinjaman RM20 juta tersebut. **A**
- (c) Win Luck akan cagar sebanyak 35,714 saham biasa dalam Syarikat Borneo Utama Sdn Bhd sebagai 'collateral' dan jaminan kepada RM20 juta tersebut bagi maksud pelaburan responden pertama. **B**
- (d) Responden pertama akan memasukkan perjanjian baru mengenai pembelian saham Win Luck dalam Syarikat Borneo Utama Sdn Bhd dan pinjaman RM20 juta beroperasi sebagai penolakan (set off) terhadap harga pembelian saham Win Luck. **C**
- [46] Selepas penghakiman Mahkamah Tinggi diberi, perayu memohon penggantungan pelaksanaan penghakiman tetapi ditolak oleh Mahkamah Tinggi.
- [47] Perayu membuat permohonan untuk penggantungan di Mahkamah Rayuan dan hasil persetujuan kedua-dua pihak Mahkamah Rayuan memberi perintah penggantungan atas syarat perbicaraan dipercepatkan. **D**
- [48] Pada 9 Disember 2005 perayu telah memohon untuk suatu penggantungan di mahkamah ini atas alasan bahawa responden pertama dan ketiga telah pun mendapat penguntukan (allocation) saham-saham Win Luck dalam syarikat Borneo Utama Sdn Bhd tetapi masih belum membuat bayaran. Selanjutnya perayu menyatakan responden pertama dan ketiga yang mendapat manfaat daripada saham-saham tersebut oleh itu ia tidak akan memudaratkan mereka jika penggantungan diberi. **E**
- [49] Responden pertama dan ketiga telah membantah permohonan penggantungan melalui affidavit jawapan yang diikrarkan oleh Encik Lim Chin Khuan ('LCK') yang mengatakan bayaran telah dibuat terhadap saham-saham berkenaan oleh itu responden pertama dan ketiga akan dimudaratkan jika penggantungan diberi oleh mahkamah ini. **F**
- [50] Perayu menyatakan affidavit LCK yang mengandungi dokumen-dokumen merupakan keterangan baru (fresh evidence) yang bercanggah dengan dua pucuk surat eksh D5 dan D24 yang dikemukakan dalam perbicaraan penuh di Mahkamah Tinggi. Selanjutnya perayu menyatakan keterangan baru menunjukkan responden pertama dan ketiga telah membuat pembayaran atas penguntukan saham-saham berkenaan pada hari notis tuntutan dibuat terhadap perayu. Atas alasan tersebut perayu mempertikaikan tanggungan beliau untuk membuat bayaran bersabit akujanji kedua (DSSN-2). **G**
- H**
- I**

- A [51] Perayu menegaskan bahawa akujanji kedua telah lupus melalui suatu perjanjian yang mana responden pertama dan ketiga telah membayar Anika Desiran Sdn Bhd ('Anika') dan Corak Nakhoda Sdn Bhd ('Corak'). Oleh yang demikian perayu mendakwa beliau tidak perlu membayar responden pertama dan ketiga seperti diputuskan oleh Mahkamah Tinggi.
- B [52] Dalam hujahnya peguam perayu menegaskan bahawa dokumen-dokumen yang diekshibitkan dalam affidavit LCK yang diikrarkan pada 28 Disember 2005 adalah suatu keterangan baru (fresh evidence) yang disembunyikan semasa perbicaraan tindakan perayu terhadap responden
- C di Mahkamah Tinggi dan secara langsung bertentangan dengan surat tuntutan oleh responden untuk mendapat balik wang RM7.350 juta daripada perayu (sila lihat DSSN-3).
- D [53] Sehubungan dengan itu beliau menyarankan bahawa teras pembelaan perayu ialah akujanji kedua telah dilenyapkan oleh 'superceding agreement' dan menjadi tanggungan responden pertama dan ketiga untuk membayar terhadap saham yang diperuntukan dalam kedua-dua syarikat berkenaan. Justeru itu menunjukkan responden pertama dan ketiga bergantung kepada keterangan baru (fresh evidence) bila membantah permohonan perayu untuk
- E penggantungan pelaksanaan.
- F [54] Adalah menjadi teras hujah peguam perayu jika '*fresh evidence*' tersebut tidak disembunyi semasa perbicaraan sudah tentu Mahkamah Tinggi akan membuat penentuan yang berlainan (different conclusion) kerana keterangan baru tersebut begitu meyakinkan untuk menunjukkan responden tidak ada asas untuk membuat tuntutan terhadap perayu atas wang sejumlah RM7.350 juta tersebut.
- G [55] Dalam hujah bertulis dan lisan untuk menentang permohonan di lampiran 31a peguam responden menegaskan bahawa pihak responden tidak pernah sembunyikan keterangan yang dimaksudkan. Persoalan pembayaran kepada Anika dan Corak tidak relevan kepada pembelaan perayu kerana pembelaan perayu berteraskan akujanji telah dilupuskan dengan
- H kononnya wujud pembayaran atas jumlah RM7.350 juta tersebut kepada Win Luck.
- I [56] Mengikut beliau keterangan baru dapat dikemukakan di Mahkamah Tinggi semasa perbicaraan jika langkah '*reasonable diligence*' diambil oleh perayu misalnya melalui soal balas terhadap saksi-saksi. Kegagalan pihak perayu berbuat demikian membuktikan tiada langkah sepatutnya diambil oleh perayu malahan dalam affidavit sokongan perayu tidak menunjukkan langkah tersebut telah diambil. Adalah menjadi teras hujah pihak responden, permohonan di lampiran 31a adalah '*after thought*' untuk memperbaiki atau

mengubah asas pembelaan perayu menjuruskan kepada 'relitigation' (*Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1).

A

[57] Seperkara dengan itu peguam responden menghujahkan pembelaan perayu tidak diasaskan atas penguntukan saham-saham dalam syarikat-syarikat Anika dan Corak bersangkut paut dengan kononnya 'oral superceding agreement' yang boleh melupuskan tanggungan perayu untuk membayar balik wang RM7.350 juta tersebut kerana ia tidak diplidkan seperti terbukti dalam butiran pembelaan. Malahan ia juga tidak diplidkan mengenai peranan perayu dalam penguntukan saham Anika dan Corak. Perayu juga tidak kemukakan keterangan semasa bicara mengenai saham Anika dan Corak ada kaitan dengan 'oral superceding agreement'.

B

C

[58] Prinsip undang-undang dalam permohonan di bawah peruntukan s 69 Akta dan k 7 KMR sudah mantap. Nas-nas seperti kes Inggeris *Ladd v Marshall* [1954] 3 All ER 745 menjadi panduan bila mana mahkamah berdepan dengan permohonan sedemikian. Di antaranya ialah kes *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70; *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445; [1996] 1 CLJ 725.

D

[59] Prinsip-prinsip mengenai penerimaan keterangan lanjut (fresh evidence) telah diterapkan ke dalam KMR melalui PU(A) 380/98 dan menjadi kaedah kecil (3A) pada peruntukan k 7 (*Maxisegar Sdn Bhd*). Kaedah 7(3A) adalah seperti berikut:

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(3A) Pada masa pendengaran rayuan, keterangan lanjut tidaklah boleh diterima melainkan jika Mahkamah berpuas hati bahawa:

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(a) pada masa pendengaran di hadapan Mahkamah Tinggi atau Mahkamah Rendah, mengikut mana-mana yang berkenaan, keterangan baru itu tidak boleh didapati oleh pihak yang hendak menggunakan keterangan baru itu, atau bahawa usaha yang munasabah tidak mungkin menjadikan keterangan baru itu boleh didapati sedemikian; dan

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(b) keterangan baru itu, jika benar, akan mempunyai atau mungkin mempunyai kesan penentu atas keputusan Mahkamah Tinggi atau Mahkamah Rendah itu, mengikut mana-mana yang berkenaan.

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[60] Kami membenarkan lampiran 31a atas fakta latarbelakang kes ini. Jika diteliti fakta kes ini adalah berbeza dengan fakta kes-kes yang dibangkitkan oleh responden. Dalam kes-kes tersebut permohonan adalah untuk kemukakan keterangan baru dalam rayuan ialah mengenai keterangan yang bukan merupakan yang wujud dalam prosiding rayuan. Misalnya dalam kes *Maxisegar* keterangan baru yang hendak dikemukakan ialah keterangan saksi

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- A yang akan diperolehi melalui proses prosedur pengambilan keterangan saksi dalam bicara. Dalam permohonan lampiran 31a keterangan baru ialah untuk mengemukakan affidavit-afidavit bersabit dengan prosiding penggantungan di mahkamah ini. Adalah tidak dinafikan keterangan tersebut tidak dikemukakan semasa perbicaraan di Mahkamah Tinggi. Ia hanya ditemui
- B di dalam affidavit-afidavit dalam prosiding penggantungan yang dikatakan.

- [61] Pada pendapat kami keterangan baru tersebut berkemungkinan dapat mempengaruhi keputusan HMT kerana ia adalah bersangkutan rapat dengan pembayaran harga saham-saham dalam Anika dan Corak yang dianggap
- C boleh melupuskan tanggungjawab perayu untuk membayar RM7.350 juta memandangkan dalam pembelaan perayu diplid wujud *superceding agreement*. Adalah suatu prinsip mantap bahawa keterangan baru tersebut boleh diterima walaupun berkemungkinan boleh dipertikaikan.

- D [62] Kami bersetuju dengan hujah peguam pemohon bahawa keterangan baru yang dijumpai pada saat-saat akhir tidak mungkin dapat dijadikan kenyataan dalam pliding.

- E [63] Akhir sekali kami berpendapat dengan keterangan baru ia akan dapat membantu mahkamah ini mencapai keputusan yang saksama. Kami juga berpandangan penerimaan keterangan baru yang merupakan affidavit-afidavit berkenaan tidak akan memprejudiskan responden kerana affidavit-afidavit tersebut juga termasuk affidavit pihak responden sendiri.

- F *Application allowed.*

Reported by M Sivabarathi

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